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NO. 85-889

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE STATE OF COLORADO,
Petitioner,

v.

STEVEN LEE BERTINE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF FOR THE STATE OF COLORADO

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PETITION FOR CERTIORARI FILED NOVEMBER 22, 1985
CERTIORARI GRANTED MARCH 24, 1986

58 pp

QUESTION PRESENTED FOR REVIEW

Is a routine, good faith inventory search of closed containers in an automobile "reasonable" under the Fourth Amendment as interpreted by the Court in Illinois v. Lafayette?

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BRIEF FOR THE STATE OF COLORADO

OPINION BELOW

The opinion of the Supreme Court of Colorado is reported at 706 P.2d 411 (1985)(Pet. Cert. 25).

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on September 30, 1985. No petition for rehearing is permitted on an interlocutory appeal in Colorado. The petition for a writ of certiorari was filed in this Court on November 22, 1985 and was granted on March 24, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., §1257, and 1(b) and 1(c) of Rule 17 of the revised rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 10, 1984, Officer Toporek of the Boulder Police Department followed a 1957 panel truck weaving in traffic and traveling fifty to fifty-five miles per hour in a thirty mile-per-hour zone (J.A. 6-7). Upon stopping the vehicle Toporek observed the driver, Respondent in this case (hereinafter referred to as "Defendant"), to have a strong odor of alcohol on his breath, watery and glassy eyes, and slow speech (J.A. 10-11). The Defendant performed roadside sobriety maneuvers to determine whether he could drive his truck safely. In Toporek's opinion, the Defendant failed those tests (J.A. 12-14). Toporek arrested him for driving under the influence of alcohol and placed him in his patrol vehicle. Toporek then radioed Officer Reichenbach to come and impound Defendant's truck because it was parked in a lane of travel, thus obstructing traffic on a busy, four-lane

highway through the city of Boulder (J.A. 9, 14-16, 51).

At the hearing on Defendant's motion to suppress evidence, Toporek and Reichenbach testified that pursuant to Boulder Municipal Code[1] and the Boulder Police Department Regulations (J.A. 88) automobiles are routinely impounded when

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[1] Boulder Rev. Code §§7-7-2(a)(1) and -2(a)(4) provide:

> A peace officer is authorized to remove or cause to be removed a vehicle from any street, parking lot, or driveway when:
>
> (1) A vehicle is situated in a manner that obstructs the normal movement of traffic and the person in possession of the vehicle is not present or is unwilling or unable to provide for its immediate removal; [or]
>
> * * *
>
> (4) The driver of a vehicle is taken into custody by the police department.

Other subsections of 2(a) authorized impoundment under different circumstances affecting the public health, safety, and welfare.

they constitute a traffic hazard or when the driver is arrested. (J.A. 15-16, 19-22, 50-51, 63-66, 71-72, 77-79). They also testified that an inventory search routinely follows an impoundment (J.A. 19-20, 77).

Reichenbach arrived at the scene of the arrest at about the time Toporek left to take the Defendant to the Boulder Police Department for booking and a statutorily mandated blood alcohol test.[2] After calling animal control to remove a dog from the truck, Reichenbach began an inventory of the truck's exterior and its contents (J.A. 22-23). He testified that inventories are routinely done to protect the owner from having any valuable items stolen during the period of impoundment,

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[2] Colorado Revised Statutes (C.R.S.) §42-4-1202(3) (1973) requires that a blood alcohol test be performed upon the request of the police officer or arrested person. The test must be performed within one hour. C.R.S., §42-2-122.1(1)(a).

to protect the police department against false claims of loss, and to protect the police and public from dangerous items such as explosives or weapons (J.A. 19-22, 41).

On his inventory form Reichenbach noted jumper cables, a tire, a shovel, some sandbags, a three-quarter full can of beer, and damage to the exterior of the truck (J.A. 23). Reichenbach also discovered a brown backpack on the floor behind the front bench seat. Upon picking it up he could tell that it contained something because of its weight and obvious fullness (J.A. 24). Reichenbach testified that in his experience people in Boulder commonly use backpacks like purses for carrying valuable items such as wallets, purses, checkbooks, cameras, calculators, and textbooks (J.A. 25). He testified that previously he had found such things of

value as well as explosives and weapons in similar backpacks (J.A. 31, 46).

Inside the backpack Reichenbach found a heavy metal flashlight, hair brush, and other items (J.A. 28-29). Additionally, he found a tan zippered nylon bag containing several hard objects. He opened the nylon bag and observed inside three silver metal cannisters and one small Irish Mocha Mint coffee can (J.A. 27-33). Each of the metal cannisters was approximately three inches by five inches and one and one-half inches in depth. The cannisters had lids which were held in place by metal clips at each end. The coffee can had an ordinary plastic lid (R. 67). Reichenbach opened the cannisters and the coffee can to see whether they contained any items of particular value or potential danger that needed to be seized for safekeeping (J.A. 32). Inside of the cannisters and can he found cocaine-related paraphernalia, i.e. a

glass "tooter" and razor blades, approximately thirteen grams of cocaine packaged in individual bindles containing from a quarter-gram of cocaine to a half-gram of cocaine apiece, three qualudes, and seven hundred dollars ($700) cash (J.A. 33-36; R. 65). Having been a narcotics officer for several years, Reichenbach recognized the items for what they were, seized them, and completed the inventory. In an outside zippered pouch of the backpack Reichenbach found an envelope containing two hundred and ten dollars ($210) cash (J.A. 39-41). Reichenbach then had the car towed to a private impound lot and brought the backpack and contraband to the police station (J.A. 36). There he did a presumptive test on the cocaine and counted all the money before putting everything into the property and evidence room for safekeeping.

PERTINENT STATE COURT PROCEEDINGS

On February 16, 1984 the Defendant was charged with driving under the influence of an intoxicating liquor and possession of cocaine with intent to sell and distribute. After the preliminary hearing the Defendant was arraigned on May 8, 1984 and pled not guilty. The trial court set a motions hearing for July 9 and 10 with trial to begin on July 16, 1984 (Pet. Cert. 8; J.A. (ii)).

Defendant's motion to suppress alleged that the arrest was without probable cause, that the inventory search was pretext for general rummaging through the car, and that the search of the closed backpack and containers exceeded the permissible scope of an inventory search (J.A. 1-3).[3]

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[3] At the motion to suppress hearing in the trial court, the Defendant conceded that "based upon Illinois v. Lafayette, our federal argument is - has been

At the motions hearing the trial court heard evidence and ruled that there was probable cause to arrest, that the inventory search was conducted in good faith pursuant to routine police procedures and was not a pretext, and that the search of the backpack and its contents was lawful under the Fourth Amendment as interpreted in Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (J.A. 79-83). However, the trial court found that the search of the backpack violated Article II, Section 7 of the Colorado Constitution (which is substantially identical to the Fourth Amendment) as interpreted by the Colorado Supreme Court in People v. Counterman, 556 P.2d 481

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basically emasculated and I would agree with the District Attorney that in a valid inventory search, basically anything and everything can be searched." (R. 148-49.)

(1976)(J.A. 83-87). Thus, the trial court suppressed the search of the backpack on state law grounds.

The trial setting was vacated and on July 19, 1984, the People filed a Notice of Interlocutory Appeal with the Colorado Supreme Court pursuant to Colorado Appellate Rule 4.1 (Pet. Cert. 9). In the opening brief the People argued that Illinois v. Lafayette established the lawfulness of inventory searches of closed containers under the Fourth Amendment and that nothing in the Colorado Constitution or case law interpreting it required a different result. The Defendant, although represented by the Public Defender, did not file an answer brief.

On September 30, 1985 a majority of the Colorado Supreme Court affirmed the trial court's suppression of the inventory search of the backpack and its contents. The Colorado Supreme Court based its decision squarely and solely on the Fourth

Amendment, specifically stating that it did not reach the issue of the Colorado Constitution.

The state court distinguished Illinois v. Lafayette on the basis that it applied only to preincarceration inventory searches, not automobile inventory searches, because the governmental interest in inventorying closed containers found in vehicles is not as great as the governmental interest in inventorying closed containers brought with an arrested person to the booking desk of the jail. Finally, the Colorado Supreme Court balanced the governmental interest in inventorying the specific items - the three cannisters and coffee can - against the Defendant's privacy interests in those items. Using this container-by-container balancing test, the Colorado Supreme Court concluded that the inventory search of the cannisters and coffee can was "unreasonable" and affirmed the trial

court's suppression of the search, albeit on federal rather than state grounds. Two of the seven judges dissented, stating that the holding of Illinois v. Lafayette was not limited to inventory searches at the station house incident to incarceration of an arrestee, but also extended to inventory searches of automobiles because the same governmental interests apply in both situations.

SUMMARY OF ARGUMENT

In a long line of cases culminating in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Court has recognized that inventory searches of automobiles are reasonable under the Fourth Amendment. Throughout those cases the Court distinguished between investigatory searches, which require probable cause and a warrant or warrant exception, and inventory searches,

which are judged upon different criteria because they do not involve the usual Fourth Amendment concerns about protecting citizens from overzealous police activity.

South Dakota v. Opperman, supra, addressed the issue of automobile inventory searches generally, but did not consider whether the scope of inventory searches included the opening of closed containers found within an automobile. Subsequently, in Illinois v. Lafayette, supra, the Court addressed the issue of closed containers and held that routine inventory searches of closed containers incident to incarceration of an arrestee are reasonable under the Fourth Amendment.

This case presents the question of whether the holding of Illinois v. Lafayette, supra, applies to inventory searches of closed containers in an automobile. That question can be answered by comparing the individual's

privacy interests and the governmental interests in inventory searches in the two contexts: the booking desk and the automobile impound.

Whether at the booking desk or at the scene of the vehicle impoundment, the citizen has a privacy interest in closed containers in his possession.

Similarly, the governmental interests in inventorying closed containers is identical in both settings. Both at the booking desk and in an impounded automobile the police are frequently confronted with closed containers that hold items ranging from the very mundane to particularly valuable to extremely dangerous. These containers include purses, boxes, bottles, bags, backpacks, and many other items. Frequently, such containers do not give any external indication of their contents.

In both the booking desk and automobile impoundment settings, the

police, as part of their caretaking function, take custody and control of the personal property of citizens. As part of this caretaking function, the police officer, property custodian, and other people in the chain of custody must handle, inspect, label, transport, and store the closed container. The basic function of the police is the same in both settings.

The governmental interests in inventory searches at the booking desk or at the time of impoundment are the same. These include: (1) protection of the owner's property from theft or careless handling, (2) deterence of false claims of theft, and (3) protection of the police and public from dangerous instrumentalities. Contrary to the Colorado Supreme Court's reasoning, the booking desk does not present a more compelling setting for closed container searches than does the impoundment

setting. The Court has consistently rejected the "less intrusive means" approach required by the Colorado Supreme Court. Further, simply segregating closed containers does not satisfy the governmental interests involved because it deprives the police any meaningful opportunity to know what it is that they must handle, transport, and store.

An additional governmental interest supports the reasonableness of inventory searches of closed containers in automobiles. As the Court noted in Illinois v. Lafayette, supra, it is not feasible to draw constitutional distinctions between closed containers that may be inventoried and those that may not. In order to protect citizens and give the police clear guidance in the thousands of inventory searches conducted daily, a single familiar standard is necessary. This need is just as great in

automobile inventory searches as it is at the booking desk.

Many other courts have considered closed container searches during inventories of automobiles since the decision in Illinois v. Lafayette. The federal and state courts that have decided the issue on Fourth Amendment grounds consistently have concluded that Illinois v. Lafayette applies equally to automobile inventory searches. Those courts have rejected the "expectation of privacy" and "less intrusive means" arguments relied upon by the Colorado Supreme Court, and have found inventory searches of closed containers in automobiles reasonable under the Fourth Amendment.

ARGUMENT

Since South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), this Court has recognized the reasonableness of inventory searches of automobiles. This case presents a narrow issue: Whether the rule of Illinois v. Lafayette permitting inventory searches of closed containers applies to closed containers found during a routine inventory search of an automobile.[4] It is important to note what is not at issue in this case. Specifically, the trial court found that there was probable cause to arrest the Defendant and that the impoundment and inventory search of Defendant's vehicle was not a pretext for

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[4] After Illinois v. Lafayette one commentator has predicted that it is "doubtless the Court would reach precisely the same conclusion as to containers within inventoried vehicles." 2W. LaFave, Search and Seizure §7.4 at 262 (1984 Supp.) (footnote omitted).

a general evidentiary search, but rather was a good faith, routine inventory pursuant to standard police procedures (J.A. 80-81).

I. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT THE ROUTINE, GOOD FAITH INVENTORY SEARCH OF DEFENDANT'S BACKPACK WAS NOT REASONABLE UNDER THE FOURTH AMENDMENT.

Prior decisions of the Court have utilized a balancing of interests test when interpreting the Fourth Amendment's proscription against unreasonable searches. This analysis requires that the Court "balance [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Illinois v. Lafayette, supra, 462 U.S., at 644; 103 S.Ct., at 2608; citing Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). See also, South Dakota v. Opperman, supra, 428 U.S., at 367-77, 96 S.Ct., at

3096-3100, and 428 U.S., at 377-80, 96 S.Ct., at 3101-03 (J. POWELL concurring).

When assessing the constitutionality of inventory searches the Court has noted the differences between the police's two basic functions: the investigatory function and the caretaking function. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), and Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), the Court recognized that the police have a caretaking function concerning the property of citizens that is separate and distinct from their investigatory function. In those cases the Court upheld the warrantless inventory search of an automobile without probable cause on the basis that the police have the right to take protective measures concerning property in their custody and control.

Subsequently, in Cady v. Dombrowski, 413 U.S. 433, 441, 447-08, 93 S.Ct. 2523,

2528-31, 37 L.Ed.2d 706 (1973), the Court found lawful the warrantless search of an automobile without probable cause based upon the police "community caretaking function:"

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. * * * The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. * * * Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

The distinction between the investigatory and caretaking functions of the police was highlighted again in South Dakota v. Opperman, supra. There the Court noted numerous instances in which the police, in their caretaking function, take custody and control of automobiles, including vehicle accidents, abandoned vehicles, and illegally parked vehicles impeding traffic or threatening public safety. South Dakota v. Opperman, supra, 428 U.S., at 369-70, 96 S.Ct., at 3097. See also J. POWELL concurring, 428 U.S., at 378-80, 96 S.Ct. 3101-02. In all of these situations the police are acting not on probable cause, but in furtherance of the public interest.

The distinction between investigatory functions and caretaking functions is central to the Fourth Amendment analysis. As Justice Powell stated in South Dakota v. Opperman:

> The routine inventory search under consideration in this case does not fall within any of the established exceptions to the warrant requirement. An examination of the interests which are protected when searches are conditioned on warrants issued by a judicial officer reveals that none of these is implicated here. A warrant may issue only upon "probable cause." In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterpise of ferreting out crime." [Citation omitted.] Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based upon a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. Thus there are no special facts for a neutral magistrate to evaluate.

South Dakota v. Opperman, supra, 428 U.S., at 383-84, 96 S.Ct., at 3104. Likewise,

the plurality opinion in South Dakota v. Opperman stated that the usual Fourth Amendment privacy concerns are not present in the inventory setting:

> The Vermillion Police were indisputably engaged in a caretaking search of a lawfully impounded automobile. * * * As in Cady, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.

South Dakota v. Opperman, supra, 428 U.S., at 375-76, 96 S.Ct., at 3100.

Therefore, when the police have an investigatory purpose in opening a citizen's closed container, the Fourth Amendment requires probable cause and a warrant or an exception to the warrant requirement. Inventory searches are different; they have a caretaking purpose and are distinguishable from investigatory searches by the circumstances that give rise to the search and the scope of the

search. Thus, applying the balancing of interests test to inventory searches generally, the privacy interest of the citizen in items within his automobile is outweighed by the governmental interest in inventorying those items.

Those cases established the reasonableness of inventory searches generally, but did not specifically address the scope of such searches, i.e. the opening of closed containers.[5]

The only prior decision of the Court addressing the scope of inventory searches is Illinois v. Lafayette, supra. There the police lawfully arrested the defendant for disorderly conduct and took him to jail. At the booking desk his purse-type shoulder bag was searched for inventory

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[5] However, several of those cases involved a search of some form of closed "container." Cooper v. California, supra, (glove compartment); Cady v. Dombrowski, supra, (trunk); South Dakota v. Opperman, supra, (glove compartment).

purposes. Inside of a cigarette case package the police found ten amphetamine pills which formed the basis of criminal charges. The Court found that the inventory search of the defendant's purse-type shoulder bag and the cigarette case found inside was not "unreasonable."

The present case poses the question of whether the holding of Illinois v. Lafayette should apply equally to inventory searches of closed containers in automobiles. That question can be approached by resort to the Fourth Amendment balancing-of-interests analysis. Two questions must be answered: (1) are a citizen's privacy interests in closed containers in his automobile the same as or different than his privacy interests in closed containers taken with him to the booking desk?, and (2) are the governmental interests the same or different in these two settings?

A citizen's privacy interests in closed containers in his automobile are identical to his privacy interests in closed containers carried with him to the booking desk. For example, Mr. Bertine's backpack is analogous to Mr. Lafayette's purse-type shoulder bag. Both are containers commonly used for carrying personal items, whether ordinary or valuable. As Officer Reichenbach testified in this case, backpacks are commonly used for carrying valuable items such as wallets, purses, checkbooks, cameras, and other items (J.A. 25-26). Presumably, Mr. Lafayette's purse-type shoulder bag could have contained any of these items. Many items frequently found on an arrested person at the booking desk are similar to items commonly found in automobiles. These include purses, briefcases, wallets, backpacks, luggage, and other items. Whether located at the booking desk or at the site of a vehicle

impoundment when searched, the owner's privacy interests are identical.

Similarly, the governmental interests in inventorying closed containers are identical, regardless of whether the container is presented at the booking desk or is found inside of an automobile. In Illinois v. Lafayette, supra, the Court identified four governmental interests that support the reasonableness of inventory searches of closed containers at the booking desk. Those were: (1) deterrence of false claims of theft, (2) protection of the arrested person's property from theft or careless handling, (3) detection of dangerous instrumentalities for the benefit of the police, arrested person and other people in jail, and (4) to assist the police in ascertaining or verifying the arrested person's identity. Illinois v. Lafayette, supra, 462 U.S., at 646, 103 S.Ct., at 2609-10. These governmental interests

were drawn directly from

South Dakota v. Opperman, supra, 428 U.S., at 370, 96 S.Ct., at 3092.

In Illinois v. Lafayette the Court took guidance from

South Dakota v. Opperman, supra, saying:

> Our prior cases amply support this conclusion. In South Dakota v. Opperman, supra, we upheld a search of the contents of the glove compartment of an abandoned automobile lawfully impounded by the police. We held that the search was reasonable because it served legitimate governmental interests that outweighed the individual's privacy interests in the contents of his car. Those measures protected the owner's property while it was in the custody of the police and protected police against possible false claims of theft. We found no need to consider the existence of less intrusive means of protecting the police and the property in their custody - such as locking the car and impounding it in safe storage under guard. Similarly, standardized inventory procedures are appropriate to serve legitimate governmental interests at stake here.

Illinois v. Lafayette, supra, 462 U.S., at 647, 103 S.Ct., at 2610. Thus, the governmental interests in conducting inventory searches are identical in the booking and automobile contexts.

Likewise, the governmental interests in inventorying the contents of closed containers are identical in both situations. In both settings closed containers are temporarily taken into police custody. These containers can hold extremely valuable items such as diamonds, precious metals, money, travellers checks, checkbooks, and similar items. Such items require special handling both to protect against theft and to protect the police from false claims of theft.

Additionally, many types of closed containers commonly encountered during automobile inventories and at the booking desk can conceal dangerous items: e.g. boxes, sacks, tubes, purses, bottles, and paper bags. Any one of these containers,

without giving any definitive external sign of its contents, could contain a loaded gun, spring knife, razor blade, volatile chemical, or explosive.

During an automobile inventory search the police officer must move around inside the vehicle where closed containers are present and perhaps pick up closed containers to evaluate them (J.A. 22-23). He or she is exposed to whatever is inside the vehicle. Also, the tow company personnel must get into the vehicle to disengage the transmission before towing and then later to secure the brakes when the vehicle is parked at the impound lot. During this time the impound operator is exposed to whatever closed containers the police officer leaves inside the vehicle (J.A. 67-68).

If the police officer decides to seize a closed container for safekeeping, he or she inevitably must turn that item over to a property custodian at the

stationhouse who must handle, label, transport, and store the item. If closed containers are left in the vehicle by the police officer, the general public is exposed to any latent danger during the towing and storage of the vehicle.

It is not reasonable to require a police officer, tow operator, or property custodian to handle, transport, and store closed containers without some knowledge of the hazards or risks involved, nor is it reasonable to expose the general public to unknown dangers. See South Dakota v. Opperman, supra, 428 U.S., at 379, 96 S.Ct., at 3101-02 (J. POWELL concurring). In short, every interest that supports inventory searches of closed containers at the booking desk is equally compelling where closed containers are discovered in an impounded automobile.

Indeed, contrary to the Colorado Supreme Court's holding, the booking desk does not present a more compelling setting

for inventory searches of closed containers. An alternative to searching closed containers at the booking desk would be to separate the closed container from the arrested person and put it in some kind of locked storage unit. Once the container is removed there is no longer any threat of weapons or contraband being introduced into the jail.

This "less intrusive means" argument was rejected by the Court in Illinois v. Lafayette:

> [There may have been a less intrusive means,] but the real question is not what "could have been achieved," but whether the Fourth Amendment requires such steps; it is not our function to write a manual on administering routine, neutral procedures of the stationhouse. ***
>
> We are hardly in a position to second guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a

> person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Illinois v. Lafayette, supra, 462 U.S., at 647-48, 103 S.Ct., at 2610. Thus the governmental interests in inventorying closed containers are not greater at the booking desk than they are during automobile inventory searches.

Finally, there is a substantial governmental interest in having clear guidelines for the police to follow during automobile inventory searches. The Colorado Supreme Court failed to recognize the importance of this governmental interest. In its opinion, that court stated that the tin cans and coffee can searched in this case gave little indication that their contents were valuable or dangerous. In essence, the Colorado Supreme Court attempted to establish a hierarchy of closed containers based upon their external characteristics.

Under this scheme only those containers giving an external indication that their contents were dangerous or particularly valuable could be opened and inventoried.

Such reasoning ignores practicality. Certain facts about closed containers are inescapable. By their very nature they frequently do not give any external indication of their contents, and the only feasible method of determining whether they contain valuable or dangerous items is to look inside. For example, both a gun case and a cardboard box could contain a loaded weapon. In Illinois v. Lafayette the Court rejected the notion that the constitutionality of closed container searches turns upon whether the container gives an external indication of its contents: "It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns."

Id., 462 U.S., at 646, 103 S.Ct., at 2610.[6]

In Illinois v. Lafayette, supra, and New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Court recognized that "a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." Illinois v. Lafayette, supra, 462 U.S., at 648, 103 S.Ct., at 2611; New York v. Belton, supra, 453 U.S., at 458-60, 101 S.Ct., at 2863-64. Likewise, a single, simple standard for the scope of automobile inventory searches is necessary

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[6] See also United States v. Ross, 456 U.S. 798, 821-22, 102 S.Ct. 2157, 2170-71, 72 L.Ed.2d 572 (1982) (J. STEVENS stating "A constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases . . . , the central purpose of the Fourth Amendment forecloses such a distinction.")

for the protection of citizens and to give guidance to police officers.[7]

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[7] The "reasonableness" of closed container searches should not turn on a host of variables, as argued by the Colorado Supreme Court. Such an approach is essentially a "less intrusive means" test that is impractical.

For example, the Colorado Supreme Court found the inventory search in this case unreasonable because the defendant was available to make alternative arrangements for the care of his truck.

Here the Defendant was arrested for drunken driving. Was the arresting police officer supposed to decide whether the Defendant was too intoxicated, or sober enough, to make an intelligent decision? Was the arresting police officer supposed to drive the defendant to the nearest telephone, wait while he called several friends to see if anyone was willing to come out and pick up his car in the middle of the night, wait longer while the friend drove to the scene of arrest, and then check out the friend's sobriety and drivers license, knowing all the time that he has an obligation by law to have a blood alcohol test performed on the defendant within a short time after the arrest? The number of impossible decisions, all of which could affect the "reasonableness" of the policeman's decision to impound and inventory, is limitless.

II. OTHER COURTS HAVE CONSISTENTLY HELD THAT THE HOLDING OF ILLINOIS V. LAFAYETTE APPLIES EQUALLY TO THE OPENING OF CLOSED CONTAINERS IN AUTOMOBILES DURING A VALID INVENTORY SEARCH.

Since the Court's decision in Illinois v. Lafayette, supra, other courts which have addressed this issue have consistently held that the principles and reasoning of Illinois v. Lafayette control in the context of automobile inventory searches. These courts, both state and federal, have specifically rejected the elevated expectation of privacy argument upon which the majority opinion of the Colorado Supreme Court relied in this case. That argument was taken from Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The federal circuit courts which have examined searches of closed containers in

an automobile inventory context since Illinois v. Lafayette have unanimously found them reasonable. In United States v. Griffin, 729 F.2d 475 (1984), the Seventh Circuit addressed the lawfulness of opening and inventorying a tape-wrapped package found inside of a paper bag which was located in a closed storage compartment behind the passenger seat of an impounded vehicle. The court stated that the contents of the package "could have ranged from worthless sand to valuable diamonds to dangerous instrumentalities of a crime, including additional weapons, contraband, or explosives". Id., 729 F.2d, at 486. The Seventh Circuit went on to quote United States v. Markland, 635 F.2d 174, 176 (2nd Cir. 1980), cert. denied, 451 U.S. 991, 101 S.Ct. 2332, 68 L.Ed.2d 851 (1981): "This does not mean, however, that Officer Fragoso was required to take the plastic thermal package into his

custody with a 'pig in a poke' obviousness as to its contents. This impersonal package could have contained anything from beer to bullion or a bomb."

Other federal circuits which have addressed this issue since Illinois v. Lafayette include:

United States v. Rabenberg, 766 F.2d 355 (8th Cir. 1985) (although not a vehicle inventory, the opening of a gift-wrapped package and removing opaque plastic covering was proper);

United States v. Duncan, 763 F.2d 220 (6th Cir. 1985) (opening of trunk pursuant to inventory was proper); United States v. Laing, 708 F.2d 1568 (11th Cir. 1983) (rehearing followed Lafayette; opening of "Yahtzee" game box in trunk was proper; specifically stating Chadwick and Sanders should not alter scope of a valid inventory search); and

United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985) (opening of briefcase was

proper). The Petitioner has not located any federal decisions, subsequent to Illinois v. Lafayette, which have held the opening of a closed container in an automobile inventory search unlawful.

State courts permitting inventory searches of closed containers in vehicles following Illinois v. Lafayette are: State v. Bronaugh, 16 Ohio App.3d 237, 475 N.E.2d 171 (Ohio App. 1984) (suitcase and paper bag in trunk); People v. Gonzalez, 62 N.Y.2d 386, 465 N.E.2d 823 (N.Y. 1984) (paper bag concealed under dashboard); State v. Muralt, 376 N.W.2d 25 (N.D. 1985) (unlocked canvass bag in passenger compartment); Boggs v. Commonwealth, 331 S.E.2d 407 (Va. 1985) (bag in trunk); State v. Fortune, 236 Kan. 248, 689 P.2d 1196 (Kan. 1984) (noting the obvious trend is away from a "plain view" limitation on inventories, approved the opening of trunk to conduct inventory); Ciriago v. State, 57 Md.App. 563, 471 A.2d 320 (Md.App.

1984) (closed briefcase);

State v. Gasparro, 194 Conn. 96, 480 A.2d 509 (Conn. 1984) (briefcase in passenger compartment); People v. Braasch, 122 Ill. App.2d 747, 461 N.E.2d 651 (Ill.App. 1984) (paper bag in trunk, whether open or closed, was a proper inventory).[8]

Even prior to Illinois v. Lafayette, the majority of courts that had addressed the issue of the opening of a closed container during an inventory search had found such a search to be reasonable under the Fourth Amendment. For example, in

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[8] The only state court decisions subsequent to Illinois v. Lafayette which have held a search of closed containers during an inventory search to be unreasonable have been based upon independent state constitutional grounds. See State v. Sierra, 692 P.2d 1273 (Mont. 1985) (preincarceration search of briefcase not valid inventory since less intrusive means available); State v. Ridderbush, 71 Or.App. 418, 692 P.2d 667 (Or.App. 1984) (search of black bag in preincarceration context illegal). Moreover, these cases are not vehicle inventory cases, but rather preincarceration searches.

Hamby v. Commonwealth, 279 S.E.2d 163 (Va. 1981), the Supreme Court of Virginia upheld the warrantless inventory search of an unlocked but zippered-shut briefcase found in the backseat of the defendant's car. In State v. Glenn, 649 S.W.2d 584 (Tenn. 1983), the Supreme Court of Tennessee held that it was lawful to inventory a closed container found in the trunk of a vehicle. In Glenn the court noted that an "impressive number" of jurisdictions have used similar reasoning in allowing the inventories of such closed containers as briefcases, suitcases, shaving kits, shopping bags and closed paper bags, and went on to cite to numerous authorities supporting this proposition.[9]

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[9] Cases cited in Glenn for this proposition are as follows: Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (Ga.1979) (plastic shopping bag); People v. Merchant, 86 Mich.App. 355, 272 N.W.2d 656 (Mich.App.1978) (contents of briefcase); In re One 1965 Econoline, Etc., 109 Ariz. 433, 511 P.2d

In summary, the overwhelming majority of courts which have addressed the search of a closed container in an automobile inventory context have looked to Illinois v. Lafayette for guidance and have found that such searches are reasonable. These courts have recognized that the three governmental objectives can only be furthered effectively by the opening of closed containers.

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168 (Ariz. 1973) (closed shaving kit); People v. Sullivan, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (1971) (briefcase); State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968) (closed paper bag); United States v. Ochs, 595 F.2d 1247, (2nd Cir.1979) (briefcase). See also, Robinson v. State, 418 So.2d 749 (Miss. 1982); Knight v. State, 398 So.2d 908 (Fla.App.1981) (latched vinyl case); State v. Crabtree, 618 P.2d 484 (Utah 1980) (luggage); Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (Ark. 1977); Lewis v. United States, 379 A.2d 1168 (D.C.App. 1977); Bennett v. State, 507 P.2d 1252 (Okl.Cr.App. 1973) (search under carpet of car); Urquhart v. State, 261 So.2d 535 (Fla.Dist.Ct.App. 1971), cert. den., 266 So.2d 349 (Fla. 1972); State v. Undorf, 210 Kan. 1, 499 P.2d 1105 (Kan. 1972); United States v. Markland, 635 F.2d 174 (2nd Cir. 1980) (zippered thermal bag); United States v. Gaultney,

CONCLUSION

The holding of Illinois v. Lafayette recognizing the reasonableness of closed container inventory searches should apply equally to inventory searches of automobiles. The individual and governmental interests in both settings are the same. Every governmental interest that supports the reasonableness of closed container inventory searches at the booking desk applies with equal force to the inventorying of closed containers found in impounded automobiles. Many lower court decisions since Illinois v. Lafayette have concluded that inventory searches of closed containers in automobiles are reasonable.

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581 F.2d 1137 (5th Cir. 1978), cert. den., 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 259 (Scrabble box taped shut); United States v. Davis, 496 F.2d 1026 (5th Cir. 1974) (briefcase).

Glenn also cited authority disallowing a search of a closed contaner in an inventory context. See 649 S.W.2d, at 586-87.

Finally, to give the law clarity and predictability in this area, a single familiar standard is needed.

For these reasons, the Petitioner asks that the Court reverse the decision of the Colorado Supreme Court and remand the case with instructions to return the case to the trial court for the setting of a trial.

Respectfully submitted,

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